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# A Comparison of Chinese and U.S. Criminal Courts

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Weiwen Miao

*I* was born in Changsha, the capital city of Hunan Province, People's Republic of China (PRC). Though I've been living in the United States for more than 15 years, I still go back to my hometown every one or two years to visit my relatives and friends. Each time I go back, I am always amazed by how rapidly it has changed since my last visit. I easily get lost in the newly built high-rise buildings and fancy shopping malls. Nowadays, most of the old small streets are gone, and the new inner-belt and outer-belt highway system is up and running. But no matter how fast those roads are being built, they still cannot catch up with the rapid increase of cars. Traffic jams are everywhere. Along with the economic changes, people are going through rapid change too. When I talk to my friends or people on the street, the biggest thing I notice is the openness of the speech. People can say pretty much anything they want in private. They freely express their anger at the government about the traffic, the instability of the society, the serious bribe problem among the government officers, and so on. It seems to me that it's really a free speech country, except that certain things cannot be published in the newspaper or shown on TV.

Changsha, like everywhere in China, is going through an economic boom, although its pace is relatively slower compared to some other big cities in China. As a statistician whose research area is legal statistics, I always wonder how the Chinese legal system has changed since China opened its doors to the world in 1978. For example, there was a Criminal Procedure Law in the People's Republic of China. Yet dur-

ing the 30 years of Mao Zedong's period, the country has been mainly ruled by a dictatorship, and decisions are usually made by Communist Party leaders, instead of the law. Or as some people put it, the leaders *are* the law. Now, with its economy booming, China is becoming more and more open and its legal system is also changing. On July 1, 1979, the new Criminal Procedure Law was passed by the Fifth National People's Congress of the PRC at its second meeting and signed by the president of the PRC. Since then, several amendments have been passed by the National People's Congress and signed by the president. The most recent amendment (the 6th Amendment) was passed by the Tenth National People's Congress at its 22nd meeting on June 29, 2006. Now the legal decisions should be made according to the law, instead of the Communist Party leaders. However, after about thirty years of dictatorship, how the law is enforced remains to be seen.

Upon researching the Chinese legal system, especially the criminal courts, the first thing I notice is the openness of the system nowadays. According to Article 152 of the PRC Criminal Procedure Law, criminal cases tried for the first time should be open to the public except cases involving national secrets, individual privacy, or if the defendant is younger than 16 years old. If the defendant is older than 16 but younger than 18, the court is usually not open to public either. When I was in my hometown, I went to a grassroots courthouse one day. In the lobby, there was a big bulletin board announcing what cases would be tried that day, together with the room numbers and approximate times. I chose a case that fitted into my schedule. It's true that the court is open to everyone. Nobody even bothered to ask me why I was there. The suspects in the case were two 20-year-old men. The charge was stealing a motorcycle. In the court, there were one chief judge, a clerk, one lawyer representing both suspects, and about ten other people, most of them relatives and friends of the suspects. But to my surprise, no parents showed up. The courts opened at 9:00 a.m., as it was published on the bulletin board. The chief judge first read the indictment. The indictment consists of four parts: (1) the suspect's name, sex, birthday, identification number, origin, race, education level, working place and title, address, and whether they had received criminal punishment/detention and, if yes, when; (2) case and cases sources; (3) facts and evidence; and (4) the reasons and legal basis for prosecution. While reading the indictment, the judge also confirmed the facts stated in the indictment with the two suspects. In this case, both suspects are middle-school graduates, living at home without a job.

What happened was the following. One evening, the two suspects rode a motorcycle to a local motorcycle store, forcefully opened a lock, and stole a motorcycle. The next day, they sold the stolen motorcycle to a local used motorcycle dealer. The owner reported the loss to the police, and within a week the police found the stolen motorcycle in the dealership. It turned out that the local motorcycle dealer knew those two suspects and the police quickly arrested them. At the police station, both suspects admitted to the crime and told the police how they opened the lock, etc.

During the trial, each suspect was asked by the chief judge whether the charge and the stated evidence were correct, whether they wanted to provide new evidence to the court, and whether they understood this was a criminal charge. They both said the stated evidence was correct and they understood that this was a criminal charge. Then the defense lawyer was given the chance to challenge the evidence provided by the police, and provide new evidence. The lawyer said, "No." Before the verdict, the defense lawyer gave a closing argument. He made three points: (a) Neither suspect had any criminal record; (b) the police found the stolen motorcycle and it had been returned to the owner; hence, there was essentially no economic loss to the owner; and (3) the suspects were only 20 years old, relatively young, and they had not put the society in serious danger. Once outside the jail, they wouldn't pose a great danger to the society either. Furthermore, once arrested, they were relatively cooperative with the police. The lawyer hoped that the judge would consider those three points when he decided the verdict. After the lawyer's closing argument, both suspects were given a last chance to defend themselves. Then the chief judge announced the verdict: three months in jail plus a 5,000 *Ren Ming Bi* (about USD \$625) fine for each of them. The whole process lasted about 45 minutes.

This was a very typical criminal case tried in a grassroots people's court (typically at the local city level), using the simplified procedure called summary trial. The summary trial was added by an amendment to the Criminal Procedure Law in 1996. It can only be used for cases tried for the first time in the grassroots people's courts and only applies when: (1) cases in which the possible maximum sentence is three years of fixed imprisonment, detention, or control; the facts are clear, well documented, and the people's procuratorate suggests or agrees to apply the proposed summary; (2) the victim(s) reported the loss to the police; and (3) it is a minor criminal case with confirmed evidence. In a

summary trial, the chief judge makes the guilty/not guilty decision and he/she also decides the length of the sentence if convicted. The prosecutor may not appear in the court.

For ordinary criminal trials, like in the United States, the people's prosecutors should attend the trial to support the prosecution. But the Chinese system works quite differently than that of the United States. The biggest difference is that in the United States, the guilty/not guilty verdict and the sentencing are two separate processes. The verdict is made solely by a jury consisting of 12 people selected randomly from the eligible population. Once convicted, the judge decides the length of the sentence, according to sentencing guidelines. In China, however, both the verdict and the sentencing are made by a so-called collegiate bench. The collegiate bench consists of sole judges or judges and people's jurors. The number of members on the bench varies, depending on the different levels of courts, but it must be an odd number to guarantee a majority if bench members disagree with each other. According to the PRC Criminal Procedure Law, in the grassroots people's court or the intermediate people's court that tries the case for the first time, the number of members on a collegiate bench must be three. In the higher people's court or Supreme People's court that tries the case for the first time, the collegiate panel should consist of three to seven people. In the appeals court, the number on the collegiate bench is three to five. When the collegiate bench is the combination of judges and people's jurors, the ratio of people's jurors to judges should be no less than 1 to 3. The exact number of people's jurors on a collegiate bench should be approved by the standing committee of the people's congress at the same level of the court. If the collegiate panel members disagree on the decision, the verdict is based on the decision of the majority. But the view of the minority should be included in the transcripts. The bench transcript should be signed by all members on the collegiate bench.

In Chinese criminal courts, judges play a pivotal role. Not only do they rule the court, but they also ask questions during the trial. According to the Chinese Criminal Procedure Law, both the verdict and sentencing are determined by the collegiate bench, and the collegiate bench may consist of all judges. Even in cases involving people's jurors, Liu pointed out that the ratio of people's jurors usually just barely reaches 1 to 3, as required by the law.<sup>1</sup> In my hometown, Changsha, the collegiate bench of a grassroots court consists of a chief judge, a judge, and a people's juror. The ratio of people's juror to the judges is exactly 1 to 3. In other words, judges are generally the majority on

the collegiate bench. As the law does *not* require the collegiate bench to reach a consensus when making decisions in both verdict and sentencing, judges are essentially the decision makers in both processes. I was told by a grassroots judge that each year, the courthouse tries to keep the percentage of cases involving a people's juror at a certain level. But there is no law that requires a minimum percentage and so far there are no consequences if this percentage is too low. Another difference of the roles judges play in the criminal courts is that in the Chinese system, according to Article 158 of the Criminal Procedure Law, if the collegiate bench has doubts about the evidence, the court has the right to investigate. In the United States, neither the judges nor jurors have the right to obtain new evidence.

The role of people's juror in the Chinese legal system is also quite different than that of jurors in the United States. In the United States, jurors sit in the court, listen to the arguments made by the defense lawyers and the prosecutors, and decide whether the defendant is guilty or not guilty, using their common sense. They don't have to understand the law. In China, people's jurors have a much more active role in the court. According to the criminal law, people's jurors have exactly the same right as the other judges on the collegiate bench. They sit at the same place in the court as the other judges, they can ask questions in court, and they vote independently in both the verdict and the sentencing. Essentially, they act just like the other judges in the court. The only restriction is that people's jurors cannot be the chief judge in the court.

The treatment of Chinese jurors is similar to that of U.S. jurors. In the United States, employers are required to give jurors time off when they are on jury duty, and jurors get paid at the average wage when they are on duty. In China, according to the "Decisions on Improving the People's Juror System," Article 18, the employer cannot deduct any wages, bonuses, or other benefits of its employees when they are on jury duty. If the people's juror doesn't have a fixed income, the people's court must pay the jurors the average wages for the actual days they work in the court.

The eligibility of the people's jurors in China is also similar to that of the United States. According to the law passed by the Tenth National People's Congress at its 11th meeting (August 28, 2004), eligible people's jurors in China should do the following: support the Constitution of the People's Republic of China; be at least twenty-three years old; have a good character; and be fair, upright, and in good health.

In general, people's jurors should have a higher education (such as an associate degree). People's Congress Standing Committee, members of the people's courts, people's prosecutors, public security or national security authorities, judicial and executive staff, and practicing lawyers cannot be people's jurors in China. Also, those who had criminal penalties or were discharged from public employment cannot be jurors. What strikes me about the eligibility of being a people's juror in China is the education requirement. In the United States, which has a much higher educational level nationwide than China, the jurors are ordinary people who can read and write in English but need not have higher education. From one point of view, the higher education requirement in China is way too high, given China's current education level. This requirement limits the jurors' selection pool. As people's jurors are no longer the "ordinary people," they come from the sub-population with higher education levels. The other point of view has its own reasons: according to the Chinese Criminal Procedure Law, people's jurors act like judges in the court. They vote not only on the verdict, but also on the sentencing. They need to understand the law to do the job. The higher education requirement provides a better pool of eligible jurors.

The biggest difference between Chinese jurors and U.S. jurors is the selection process. In the United States, jurors are randomly selected from the eligible population *for each individual case*, and both the defendant and the prosecutor have the right to veto a certain number of jurors with and without a cause. In China, people's jurors are selected by first generating a pool of people's jurors. This is a rather complicated process. At the beginning, grassroots organizations recommend people or individuals volunteer themselves to the grassroots courts. Then the courts, in conjunction with the government, review those candidates. Finally, the standing committee of the grassroots people's congress approves the candidates. Notice that the people's jurors' pool is created by recommendation and volunteering, *not* randomly selected from the eligible population. This inevitably introduces selection bias. Once the pool is determined, the actual jurors for each individual case are selected from this pool randomly. Each people's juror's term is five years. Even though for each case jurors are selected randomly from the pre-selected pool, because the pool itself is not randomly generated, it is hard to say that the people's jurors are randomly chosen to represent the general opinion about the case. Furthermore, each juror serves the court for five years. This results in some people becoming



“professional jurors.” As pointed out by Liu, in Shenzhen, Lo Wu district court, the people’s juror He Junjie was on the collegiate bench for 242 cases within a year, helped the court for more than 400 appeals, and even had his own office in the district court!<sup>2</sup> This people’s juror no longer represented the general public. He had become a fully professional judge, just without the title. Another shortcoming of long-term jurors is that both sides (the prosecutor and the defendant) have clear objects to bribe.

In the United States, evidence used in criminal courts must be relevant, admissible, and impartial. In China, there is no uniform Evidence Act. The Criminal Procedure Law explicitly states that only evidence that has been confirmed to be true can be used in court. But it does not provide admissibility and exclusion rules. The legislative intent of the provision of this standard might be good, but it is not realistic. How to weight the evidence provided in court depends almost entirely on the individual members of the collegiate bench.

Conviction in the court is quite different in the United States than in China. In the United States, the burden of proof is on the prosecutor, not the suspect. The suspect is assumed to be innocent until proved guilty. The criterion used in conviction in criminal cases is “beyond a reasonable doubt.” In deciding *United States v. Fatico* (1978), Judge Weinstein asked ten of his colleagues to give numerical values to the four criteria used in conviction in the United States. For the “beyond a reasonable doubt” criterion, nine judges gave numbers between 76% and 95%, with the median value of 85%. In other words, typical judges thought that prosecutors need to show that the suspect is 85% or more likely to be guilty in order to get a conviction in the criminal court. Recall that in the United States, the guilty/not guilty verdict is made by jurors, not judges. Professor Gastwirth asked statisticians about the same probability. Almost all responses were 95% or greater and very few were less than 90%.<sup>3</sup> It is safe to say that in the United States, the “beyond a reasonable doubt” criterion generally corresponds to at least an 85% of being guilty. But in China, there is no clearly stated standard for conviction. Again, the guilty/not guilty verdict almost entirely depends on the view of the individual members of the collegiate bench. It’s very possible that different members may have different standards of proof and vote differently, given the same evidence.

In the United States, statistics is used in selecting jurors, in conviction, and in sentencing. During my *short* research period, I was trying to find out how statistics or other scientific evidence, like DNA evi-



dence, is used in the criminal court. Unfortunately, I couldn't find any data. Probably in the current Chinese system, those more advanced tools are still not commonly used. As one judge in civic court told me, judges are afraid that the experts will say whatever the prosecutors/lawyers want them to say, instead of following the science. But I think there is a huge advantage of using scientific evidence in Chinese courts. As in the Chinese criminal courts, the collegiate bench members are highly educated and have a high level of science literacy. The experts in the court may not be very concerned about the explanation of science concepts to the bench members, and hence may be able to concentrate more on the science issues involved. In other words, in similar situations, the choice of science methods may be different in the U.S. system than in the Chinese system, as experts need to consider whether the audiences will understand and be convinced by the scientific argument. It is possible that in the near future, scientific evidence will be used more often in Chinese courts.

Overall, in criminal courts, the Chinese system works quite differently than that of the United States. In my opinion, the legal system in current China is open and the decisions in the courts are generally made according to the law instead of for political reasons, which is a huge improvement. Of course, like any legal system in the world, there is still quite a lot of room for improvement. Questions remain, for example, about how to guarantee a true randomly selected pool of people's jurors instead of using the recommendation or volunteer method; what are clear standards to use in conviction and sentencing; and how can more scientific evidence be used in court. ●

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## Notes

1. Liu 2006.
2. Ibid.
3. Gastwirth 1992.

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